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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE WADE FINKENKELLER,

Defendant and Appellant.

C045325

(Super. Ct. No.
CM018843)

After defendant Jesse Wade Finkenkeller used his mother's ATM card to make unauthorized withdrawals from her bank accounts totaling \$600 and then used the money to buy drugs, he pled no contest to theft from an elder (Pen. Code, § 368, subd. (d)), admitted having served two prior prison terms, and was sentenced to prison.

On appeal, defendant claims the trial court erred by failing to consider whether he should be committed to the California Rehabilitation Center (CRC). (Welf. & Inst. Code, § 3051; further

section references are to this code.) We disagree and shall affirm the judgment.

BACKGROUND

At the time of sentencing, defendant was 47 years old and had a record of prior criminal offenses spanning nearly 30 years. His record includes seven prior felony convictions (the majority of which involved theft or drugs), more than 20 misdemeanor offenses, and ten parole violations.

In his statement to the probation officer, defendant "said he was addicted to methamphetamine and asked for 'help.' He said for the first time in his life he really wants to quit using drugs." According to defendant, until the day of his arrest, he had been using methamphetamine daily for about 25 years. In a handwritten statement included in the probation report, defendant said: "I took money [from] my mom to get drugs with. I have a very bad drugs [sic] problem and I have had it for so long I need help with it. . . . I ask for help with my drug problem. Pl[eas]e help me." In a separate letter to the judge, defendant wrote: "Sir, my entire history of criminal behavior has been due to my drug habit. . . . I've never had a structured drug program like the Progress House . . . where I can learn to live in society without the use of drugs. Please sir, consider my statement request. Thank you in advance."

In her victim's statement to the probation officer, defendant's mother stated she "'would like him to go to a drug rehabilitation program. He really does need help.'"

At the sentencing hearing, defendant's mother told the court that defendant "needs help. He doesn't need to go back to prison. He needs to go to some place that will help him." The court responded: "When I first read this, I knew . . . that he needed help, but on the other hand, I saw that he has had many, many, many opportunities to get that help, and he has turned each and every one of them down. Not only has he served five prior prison terms, but he has violated his parole on numerous occasions."

Thereafter, defense counsel asserted that, "if given the opportunity, this time [defendant] would seek the help that he desperately needs. He has admitted to me that he has a raging addiction. I am not sure that that is a change from anything that he has ever said before, but he needs, on the face, he meets the criteria for a drug program"

The court sentenced defendant to state prison.

DISCUSSION

Section 3051, which vests discretion in the trial court to determine whether evaluation for commitment to CRC is appropriate, states in pertinent part: "[U]pon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant's record and probation report indicate such a pattern

of criminality that he or she does not constitute a fit subject for commitment under this section."

Thus, the exercise of discretion to initiate civil commitment proceedings in lieu of a prison sentence involves a two-step process: "The court must determine if defendant is addicted or in danger of becoming addicted to narcotics; and, if so, the court must either suspend execution of sentence and order initiation of CRC commitment proceedings or find the defendant unsuitable for such commitment." (*People v. Masters* (2002) 96 Cal.App.4th 700, 704; accord, *People v. Granado* (1994) 22 Cal.App.4th 194, 200.)

"A trial court's preliminary determination under section 3051 of a defendant's fitness for rehabilitative treatment necessarily involves an assessment, based upon the defendant's record and probation report, whether the defendant's main problem is drug abuse or a criminal orientation as reflected in a pattern of criminality. Because this is inherently a qualitative judgment on the available information, the statute invests the court with 'a broad discretion which will not be disturbed on appeal in the absence of abuse.' [Citations.]" (*People v. Cruz* (1990) 217 Cal.App.3d 413, 421, quoting *People v. Zapata* (1963) 220 Cal.App.2d 903, 913.) Among the factors properly considered by the court in making a finding of a pattern of criminality--in addition to the defendant's prior convictions--are such matters as his prior performance on probation or parole. (*People v. Cruz, supra*, 217 Cal.App.3d at p. 420.)

Here, defendant claims the trial court erred by failing to consider whether he should be committed to CRC and by not making

express findings to support its decision to sentence him to state prison rather than initiate civil commitment proceedings.¹ Neither contention has merit.

First, the record reveals that the trial court did consider, and reject, defendant's request for drug abuse treatment as an alternative to incarceration, and did so based on his pattern of criminality, the statutory basis on which a court may properly exercise its discretion to refuse to initiate CRC commitment proceedings. (§ 3051.)

Although the defense did not say the words "CRC commitment," defendant admitted to drug addiction, his mother requested that he receive drug treatment in lieu of a prison sentence, and defense counsel likewise agreed that defendant was addicted and asked for treatment in lieu of imprisonment.

¹ The People argue that defendant has forfeited his right to raise this issue by failing in the trial court to expressly request a CRC commitment. (Citing *People v. Planavsky* (1995) 40 Cal.App.4th 1300.) Not so. Although defense counsel did not expressly refer to CRC or section 3051, it is readily apparent from the record that (1) defendant admitted addiction and sought drug treatment rather than prison, and (2) the court rejected defendant's request based on its evaluation of his prior pattern of criminality and poor performance on probation. Since the court considered the statutory factors of addiction and pattern of criminality that it would have been required to evaluate if defendant made an express reference to section 3051, it appears that the court understood the comments by defense counsel and defendant's mother as requests for either local treatment or a CRC commitment. Hence, there is no merit in defendant's claim that he received ineffective assistance of counsel because his attorney did not request a CRC commitment.

The court's comments at the sentencing hearing show it was well aware from reading the probation report of defendant's claim of methamphetamine addiction and accepted that claim. Under these circumstances, no express finding of addiction was required. (*People v. Masters, supra*, 96 Cal.App.4th at p. 704 [where the court's comments at the sentencing hearing show the court was well aware of the defendant's addiction, no express finding of addiction is required].)

Although it acknowledged defendant's addiction, the trial court unquestionably found that defendant did not qualify for civil commitment as an alternative to incarceration because of his pattern of criminality, including his many prior prison terms and poor performance on probation. Responding to the mother's request that her son receive drug treatment, the court noted defendant had failed to avail himself of his "many, many, many [prior] opportunities to get that help," had five prior felony convictions, and many failures on probation. The court's comment that defendant had missed many opportunities to address his addiction can be read as "simply reflect[ing] the court's opinion that defendant's main problem was not drug addiction but rather 'a criminal orientation as reflected in a pattern of criminality.' [Citation.]" (*People v. Masters, supra*, 96 Cal.App.4th at p. 705, quoting *People v. Cruz, supra*, 217 Cal.App.3d at p. 421.)

The court's failure to expressly state that it was declining to initiate civil commitment proceedings based upon defendant's pattern of criminality is not prejudicial where, as here, the record is sufficient to support a finding that the court believed defendant

did not qualify for civil commitment because he had an extensive criminal history and prior poor performance on probation. (*People v. McLemore* (1994) 27 Cal.App.4th 601, 609-610; cf. *People v. Masters, supra*, 96 Cal.App.4th at p. 706 [trial court did not err in failing to make express finding that defendant's pattern of criminality justified no civil commitment, so long as "the record includes 'some specification of where the court was looking in making its finding of [a pattern of criminality]. In other words, was it looking at the defendant's prior convictions, his prior performance on probation or parole, the nature and seriousness of the current offense, or some other facts evidencing criminality?'"].)

Because the record supports a finding that defendant was unfit for CRC because of his pattern of criminality, "the sentencing court's choice is presumed to be based on those facts." (*People v. McLemore, supra*, 27 Cal.App.4th at p. 610.) Since those facts support its ruling, the court did not abuse its discretion in committing defendant to state prison rather than having proceedings initiated to commit him to CRC.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

BLEASE, J.

DAVIS, J.